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Supreme Court, U.S.
FILED
JAN 8 1998
CLERK

No. 97-720

In The

Supreme Court of the United States

October Term, 1997

SAIPAN HOTEL CORPORATION
dba HAFADAI BEACH HOTEL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The National Labor Relations Board (NLRB) continues to ignore the legal issue presented throughout the course of the underlying related cases, and fails to recognize the significance of the *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and for other purposes* (Covenant), which is the operative governing document that delineates the political relationship between the United States and the Commonwealth of the Northern Mariana Islands (CNMI). The NLRB's arguments warrant the following brief reply.

1. The NLRB attempts to characterize the cases before this Court as a "factual" dispute between Hafadai and the NLRB. This is not so. The purely legal issue before this Court involves a jurisdictional struggle between the CNMI and the NLRB. The CNMI has sovereign immigration authority pursuant to Covenant section 503(a) and has manifested that authority in the Nonresident Workers Act (NWA). The NLRB claims jurisdiction over nonresidents through Covenant section 502(a)(2), which makes laws generally applicable in Guam and the States – such as the National Labor Relations Act (NLRA) – applicable to the CNMI. The important legal question presented is whether, under the terms of the Covenant, the NLRB has jurisdiction over nonresident workers in the CNMI. The application and reconciliation of the NWA and the NLRA in the CNMI requires statutory construction of the Covenant itself. See Covenant, Petition App. 152-168. This issue was presented to the NLRB from the inception of the cases below. Throughout the course of

the proceedings, the NLRB has continued to ignore this legal issue, and continues to ignore it in its opposition.

The NLRB's position that there is no conflict between the NLRB and the NWA is purely an attempt to mask the present struggle between two government agencies – the NLRB and the CNMI Department of Labor – who both claim control over nonresident workers in the CNMI. To maintain that there is no conflict between the NLRA and the NWA is to ignore the entire record below, the continuing battle between the NLRB and the CNMI Department of Labor, as well as the presence of, and argument by, the CNMI at oral argument before the Ninth Circuit Court of Appeals.

If there were no conflict between the NLRA and the NWA, then the NLRB and the CNMI Acting Attorney General would not dispute whether the opinions below favor the NLRB or the CNMI. See Petition App. 246-256. If there were no conflict, the CNMI would not need to challenge the NLRB's bargaining unit and remedial orders which confer upon nonresidents the right to permanent employment, in direct contravention of CNMI law mandating only temporary employment. See Amicus Brief of the CNMI, *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (CA9 1997) (Nos. 96-70096, 96-70198) (hereinafter "CNMI Amicus Brief") (seeking reversal of the NLRB's infringement upon the CNMI's legislative authority and the abrogation of a power specifically vested in the CNMI by negotiated agreement with the United States). If there were no conflict, Hafadai and other employers in the CNMI would not be placed in a position of having to choose between the laws of separate sovereign governments.

The conflict arises not just from the application of the NLRA and the NWA, but from the purposes and policies underlying the statutes themselves. In its petition, Hafadai described three existing conflicts which illustrate the inherent irreconcilability between the purpose, policies, and remedies of the NLRA and those of the NWA. The NLRB characterizes these examples as "hypothetical" and implies that there are no real conflicts. However, this argument is disingenuous given the admissions made by the NLRB during the course of the underlying proceedings. For example, both the NLRB and the court of appeals below have recognized "the single instance in which [Hafadai] was faced with an apparent conflict between a replacement resident and a nonresident[.]" Petition App. 18-19; Brief in Opp. at 16. The NLRB also has admitted that the NWA's mandatory time limit imposed on a nonresident worker's contract "would be an impermissible intrusion into the collective-bargaining process," and has maintained, without support, that it "would therefore be preempted." Brief for the NLRB at 55, *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (CA9 1997) (Nos. 96-70096, 96-70198).

In order to decide this jurisdictional conflict and the legal issues presented, the NLRB and the court of appeals should have applied basic principles of statutory construction to determine, under the Covenant, whether the NLRA or the NWA prevailed. This was not done. Instead, the NLRB ignored the conflict, applied its own Board-made law to impermissibly expand its limited jurisdiction, and essentially gave nonresident workers permanent employment in the CNMI, a status which is expressly prohibited under the NWA. Nevertheless, the

entire record in the cases below and the NLRB's current posture in pending matters in the CNMI contradict the NLRB's contention that no conflict exists between the NLRA and the NWA. The conflict exists; it has resulted in a dispute over which government is in charge of nonresident workers, and Hafadai and other employers are caught in the middle of this dispute. Hafadai respectfully requests that certiorari be granted to resolve this dispute between the two sovereign governments.

2. The NLRB also mischaracterizes the nonresident workers in the cases below as lawfully entitled to work and to be present in the CNMI, and thus, entitled to the NLRB's remedies as set forth in *Sure-Tan, Inc. v. NLRB,* 467 US 883 (1984) (conditioning offers of reinstatement on legal reentry, and, in computing back pay, deeming employees "unavailable" for work during any period when they were not lawfully entitled to be present and employed in the United States). In support of its contention, the NLRB submits that "the reason the workers' contracts expired in the first place was that petitioner unlawfully refused to renew the contracts with the CNMI authorities." Brief in Opp. at 18. This argument is fundamentally flawed in two respects.

First, the NLRB's opposition rests upon the erroneous presumptions that nonresidents have the "right" to permanent employment and that they are "entitled" to a renewal of their temporary contracts. The NLRB's presumptions are in direct conflict with the temporary status of nonresidents mandated under the NWA. The court of appeals below exacerbated these erroneous presumptions by misfocusing on the "unavailability" issue as whether

the nonresidents had *gained entrance* into the CNMI lawfully. See Petition App. 20. If upheld, these presumptions would abrogate the CNMI's ability to control the exit of nonresidents from the CNMI, and *a fortiori*, the immigration matters within its sovereign control, in direct conflict with "the CNMI's sovereign control over its immigration matters." Petition App. 20; see generally, CNMI Amicus Brief.

Second, the NLRB maintains that the nonresident workers were lawfully present in the CNMI by bootstrapping this argument on its claim that the nonresident workers were entitled to renewal of their contracts. This argument must fail because the nonresident workers' legal right to be present in the CNMI cannot be assessed on the basis of an NLRB determination that the nonresident workers were entitled, under the NLRA, to continued employment. The nonresident workers' rights to be legally present in the CNMI is a matter controlled solely by the NWA. Accord *Sure-Tan*, 467 US 883 (1984) (noting that, in devising remedies for unfair labor practices, the NLRB is obliged to take into account the "equally important Congressional objective" of deterring unauthorized immigration that is embodied in the immigration and Nationality Act).

Section 4435(g) of the NWA provides that when a nonresident worker's contract expires, the nonresident is no longer entitled to remain in the CNMI. 3 CMC § 4434(g), Petition App. 186. Therefore, nonresident workers whose contracts have expired are, at the time of the contracts' expiration, not lawfully entitled to work or remain in the CNMI. In fact, in the cases below some nonresident workers had departed the CNMI after their

contracts with Hafadai had expired. The court of appeals upheld the NLRB's order requiring Hafadai to reinstate the workers and, if necessary, to apply for entry permits for the nonresident workers who no longer were present in the CNMI. Petition App. 77.

The CNMI objected to these rulings as conflicting with the NWA, and as infringing upon the CNMI's exclusive authority over immigration. See CNMI Amicus Brief at 9-10. To date, the CNMI has permitted the nonresident workers in the cases below to work in the CNMI only under temporary work authorizations that must be renewed every ninety (90) days until the underlying cases reach a final resolution.

Clearly the facts indicate that *Sure-Tan's* requirement of lawful presence was not always satisfied in the cases below. Accordingly, the remedies upheld by the court of appeals below conflict with this Court's decision in *Sure-Tan*. Even for those nonresident workers who were physically present in the CNMI, the circuit courts of appeals are split regarding *Sure-Tan's* scope of remedial relief, specifically in cases in which employees are not lawfully entitled to work, but are, nonetheless, physically present. Hafadai requests that certiorari be granted to resolve this issue.

3. Lastly, the NLRB argues that the court of appeals did not defer to the NLRB. The decisions below indicate otherwise. The court of appeals failed to conduct a *de novo* inquiry of the Covenant, especially conflicting Covenant sections 502(a)(2) and 503(a), Petition App. 162-163, and thus failed to determine, as a matter of law, whether the NLRA or the NWA applies to nonresident workers.

Instead, the court of appeals deferred to the NLRB's mischaracterization of the central issue as one involving an interpretation of the NLRA. By so deferring, the court of appeals upheld the NLRB's "reasonably defensible" statutory construction of the term "employee" under the NLRA. Petition App. 8. The court of appeals further deferred to the NLRB regarding retroactive applications of its decisions, concluding that the decisions did not work a "manifest injustice." Petition App. 12-13. Moreover, the court of appeals deferred to the NLRB's decision regarding bargaining units as "if not final, . . . rarely to be disturbed." Petition App. 13.

The decisions below fail to demonstrate that the court of appeals conducted a *de novo* review of the Covenant, the NWA, or its implementing regulations. Because the Covenant embodies the agreement between Congress and the CNMI, it should have been examined to determine the extent to which congressional policies, such as the NLRA, should be extended in the CNMI. The court of appeals conducted similar analyses of the Covenant in *CNMI v. Atalig*, 723 F.2d 682 (CA9), (holding that Covenant restrictions on right to jury trial did not violate Sixth and Fourteenth Amendments), *cert. denied*, 467 US 1244 (1984), *Wabol v. Villacrusis*, 958 F.2d 1450 (CA9 1992), (holding that land alienation restrictions in the Covenant did not violate equal protection), *cert. denied*, 506 US 1027 (1992), and *United States v. De Leon Guerrero*, 4 F.3d 749 (CA9 1993) (examining whether Insular Areas Act conflicts with the self-governance provisions of the Covenant). No such analysis was applied in the cases below.

The court of appeals' deferral to the NLRB conflicts with this Court's instructions regarding the proper scope

of deference set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 US 837 (1984) and by courts of appeals interpreting *Chevron*. Because the improper deferential posture of the court of appeals below has allowed the NLRB to dictate immigration policy for a commonwealth in violation of a specific congressional mandate (the Covenant), Hafadai respectfully requests that certiorari be granted to answer this important question and to resolve the split in the circuits over the proper scope of judicial review over agency determinations involving statutes outside the agency's limited scope of expertise.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in the petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 7, 1998